Filed 1/29/02

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CHRISTOPHER PHILLIPS, Plaintiff and Appellant, v. GARY MAHLE et al., Defendants and Respondents.	B145041 (Los Angeles County Super. Ct. No. KC030134)

APPEAL from a judgment (order of dismissal) of the Superior Court of Los Angeles County. Karl W. Jaeger, Judge. Affirmed.

Christopher Phillips, in pro. per., for Plaintiff and Appellant.

Morris, Polich & Purdy, Jeffrey S. Barron, Richard H. Nakamura; Hildebrandt & Lucky and Richard J. Hildebrandt for Defendants and Respondents.

Plaintiff and appellant Christopher Phillips, in propria persona, appeals following the trial court's dismissal of his action.[1] He had not responded to discovery requests, disobeyed several court orders to comply, and filed no opposition to defendants' motion for terminating sanctions. Appellant's opening brief addresses his desire to have his case tried by a jury, not by an arbitrator, and the discriminatory treatment he was allegedly subjected to as a result of his African-American heritage. Given plaintiff's flagrant and repeated disregard of any compliance with discovery requests or with the court's orders, we find no error in the trial court's application of terminating sanctions. We shall therefore affirm the order of dismissal.

PROCEDURAL HISTORY

The operative second amended complaint

Plaintiff's second amended complaint (SAC), filed by counsel, alleged he was the lessee of premises owned by the Mahle defendants. According to the SAC, the Mahle defendants rented the premises to a new tenant and informed plaintiff he could not return, refusing even temporary access for plaintiff to reclaim his personal property; plaintiff was forced into homelessness by their actions. The SAC alleged forcible entry and detainer, wrongful actual eviction, trespass, conversion, negligence per se, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff sought restitution of possession of the premises; damages at $40 per day, treble and any applicable other statutory damages for the forcible entry, actual and punitive damages, costs of the suit and further relief.

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[1] The notice of appeal, filed in propria persona, does not actually mention the precise order or judgment from which the appeal is taken. The clerk's transcript supplied by appellant is minimal, consisting of a notice to show cause for trial de novo, the minute order granting dismissal, notice of ruling, notice of dismissal, and the designation of the record on appeal. Respondents have completed the record on appeal through their motion to augment with documents from the trial court proceedings.

Defendants, then in propria persona, filed an answer denying the allegations and alleging multiple affirmative defenses.

Proceedings in the trial court

On December 3, 1999, with both sides represented by counsel, the court found the case amenable to arbitration and ordered the case transferred to superior court arbitration pursuant to rules 1601-1617, California Rules of Court. The arbitration was ordered completed by January 25, 2000, and a further status conference and trial setting were ordered for March 3, 2000. Plaintiff's notice of ruling added that the court confirmed the arbitration hearing date would also serve as the discovery cut-off date for the action.

Later in December 1999, an arbitration hearing date of February 23, 2000, was set for the law offices of Girardi and Keese by arbitrator John A. Girardi. On February 14, about a week before the scheduled arbitration, the arbitration return date was continued to May 12 after plaintiff's counsel's motion to withdraw was granted.[2] The order provided that the post-arbitration status conference/trial setting conference was scheduled on May 12, 2000, and "Plaintiff's appearance is mandatory unless an attorney appears on his behalf."

The arbitrator gave notice of a hearing set for May 3, 2000. Discovery proceeded. Defendants filed a motion to compel responses to inspection demand and a motion to compel responses to form interrogatories. The form interrogatories and inspection demand had been made on December 20, 1999, when plaintiff was still represented by counsel. Plaintiff's former counsel informed defense counsel that he had been unable to obtain plaintiff's cooperation in preparing discovery responses and plaintiff "essentially,

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[2] Appellant's reply brief contains a letter from his then-counsel, dated January 6, 2000, in which counsel describes plaintiff's failure to comply with discovery requests and counsel's admonition "Please be forewarned that if you refuse to comply with my instructions [to comply with discovery], I will have no other alternative but to immediately prepare, file and serve a Motion to Withdraw . . . as your attorney of record in your case." While this correspondence is not technically part of the record on appeal, plaintiff has provided it to the court and we have read it.

did not feel obligated to provide responses." Thereafter, plaintiff called defense counsel and stated he desired the matter heard by a jury and was not inclined to participate in the arbitration process.

Plaintiff did not oppose the motions. On April 10, 2000, the trial court ordered plaintiff to answer and respond within 15 days of notice.

Just as he did not respond to discovery or oppose the motion, plaintiff did not appear at the arbitration hearing on May 3, 2000. The arbitrator's award, dated May 4, 2000, stated the award against plaintiff would be entered as a judgment 30 days after filing if no party served and filed, during that period, a request for trial de novo. (Rule 1615, subd. (c), Cal. Rules of Court.) The arbitration award was filed May 9, 2000.

On May 12, 2000, the date previously set by the court for post-arbitration status conference/trial setting conference, plaintiff failed to appear. The trial court directed the clerk to set an order to show cause (OSC) re sanctions and for dismissal for June 16, 2000.

On June 2, 2000, plaintiff filed a partially handwritten and partially typed request for trial de novo. His papers were directed at his desire for a jury trial and the substantive merits of his case.

The court, having reviewed the file and noting proper notice of the OSC re failure to attend status conference and trial setting conference was not sent to plaintiff, continued the OSC to July 18, 2000.

On June 22, 2000, defendants filed a motion for order compelling plaintiff to appear at a deposition on August 1. Defendants explained that plaintiff had failed to comply with the April court order to respond to form interrogatories and inspection demand; defendant thereafter served a notice of deposition for April 25, 2000; and plaintiff failed to appear.

On June 27, 2000, defendants filed a motion for order compelling responses to special interrogatories and for monetary sanctions. Plaintiff had never responded to the

special interrogatories served on April 10, 2000. Defendants also filed a motion to have facts deemed admitted for plaintiff's failure to respond to requests for admissions.

Motion for terminating sanctions

Also on June 27, 2000, defendants filed a motion for terminating sanctions, alternatively for issue and/or evidentiary sanctions; and alternatively for further order compelling and for monetary sanctions. Defendants set forth the chronology of plaintiff's noncompliance with discovery and with court orders. The hearing, set for July 18, was re-set for July 24, 2000.

Plaintiff appeared in propria persona for that hearing. When the court noted that plaintiff had not abided by any of the court orders to date and asked why the case should not be dismissed, plaintiff invoked his desire for a jury trial. The court explained, "Well, sir, what you wanted, and you would get a jury trial, but you have to – you have to do the things that the court orders, and you can't just tell me you want a jury trial and you're not going to do anything else." Moreover, the court told plaintiff "You didn't attend the arbitration, you haven't submitted to a deposition, you didn't answer the request for admissions, and you haven't answered the special interrogatories. In my opinion you totally totally ignored and desrespected the court and its order. That isn't going to happen."

Finding "a total disregard of all court orders issued by this court by plaintiff," [3] the court dismissed the action with prejudice. The minute order dismissing the case with prejudice pursuant to Code of Civil Procedure section 583.410(a) stated that the court found plaintiff "failed to attend arbitration hearing, failed to attend status conference of 5/12/00 and failed to comply with discovery order of 4/10/00. [¶] The court [admonished] plaintiff re total disregard for all previous court orders. Plaintiff does not demonstrate good cause as to all failures to comply."

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[3] The court added: "Plaintiff having failing to attend the arbitration as ordered, the court dismisses the action with prejudice."

CONTENTIONS ON APPEAL

Plaintiff's contentions on appeal are difficult to decipher. In addition to arguing the substantive merits of his case, it is clear that plaintiff is not pleased he was sent to arbitration and clearly wanted a jury trial. Nor, he argues, could the trial court sanction him by dismissing the claim or denying his timely request for trial de novo.

DISCUSSION

The trial court did not abuse its discretion in dismissing plaintiff's case as a sanction for his blatant and continuous disregard of court orders and discovery requests.

We understand that plaintiff wanted a jury trial and did not want to be sent to arbitration. Pursuant to rule 1615, subdivision (c), he could and did file a request for a trial de novo. His problem was that he had previously repeatedly disregarded all court orders for discovery that would apply in the jury trial he so vehemently requests. By his continuous and blatant disregard of numerous discovery requests by defendants and orders by the trial court, he effectively sealed his own fate and the denial of any trial.

Plaintiff was told his appearance at the arbitration was mandatory, but did not appear. He was served form interrogatories and an inspection demand but did not respond. Defendant then filed motions to compel responses to form interrogatories and to inspection demand. Plaintiff did not oppose the motions but did not comply. He did not respond to interrogatories served on April 10, nor did he appear at a deposition. scheduled for April 25, 2000, thus forcing defendants to file yet additional motions for orders compelling responses and compelling plaintiff to appear at deposition Defendants also filed a motion to have facts deemed admitted when plaintiff failed to respond to requests for admissions. Finally, plaintiff did not appear in court on May 12, though he had been ordered to do so by the court unless an attorney appeared on his behalf.

Plaintiff filed no oppositions and gave no reasons for his repeated failures to comply with discovery. When he was at last present at the hearing on terminating sanctions, he raised his right to jury trial and never explained the lack of compliance with

discovery. Nor has he ever indicated he would comply with discovery. The letter from prior counsel attached as an exhibit to appellant's own reply brief, while not part of the record we would normally view, corroborates plaintiff's apparent and erroneous view that he need not comply with any discovery requests.

Code of Civil Procedure section 2023 authorizes imposition of several types of sanction for failure to comply with discovery. The question on review is whether the trial court abused its discretion in imposing a particular sanction. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1245.) Given the set of circumstances in the case at bench, the trial court did not abuse its discretion in ordering terminating sanctions. (*Ibid.* See also *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 174- 175 [upholding sanction of dismissal where plaintiff willfully failed to comply with discovery based on assertion of Fifth Amendment right against self-incrimination]; C*ollisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1620-1621 [upholding the striking of noncomplying defendants' answer and imposing $10,000 sanctions for a frivolous appeal].)[4]

Moreover, plaintiff's other arguments are also without merit. He contends that this was an unlawful detainer case exempt from arbitration. Not so. Appellant and not the landlord was the plaintiff in the operative second amended complaint. Relying on cases involving private, not judicial, arbitration, he also argues that the parties and not just their attorneys must agree to the arbitrator. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 400 [attorney without consent of client cannot agree to binding arbitration against client's wishes].) The case at bench involves nonbinding judicial arbitration, not private and binding arbitration. The question before us is not whether plaintiff was entitled to a trial de novo, which was never denied by the trial court, but whether he had complied with discovery that his opponents would need should the matter have proceeded

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[4] Compare *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613, where Division Four held that noncompliance with a monetary sanction, by itself, cannot justify a terminating sanction. In the case at bench, plaintiff's failure to comply with discovery went to the very ability of the defense to prepare for trial.

to trial. He obstinately refused to provide any discovery. Thus, *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, and *Salowitz Organization, Inc. v. Traditional Industries, Inc.* (1990) 219 Cal.App.3d 797, 801, cited by appellant, where dismissal imposed for refusal to participate in mandatory arbitration was reversed in the appellate court, are inapposite.

DISPOSITION

The judgment (order of dismissal) is affirmed. Appellant to bear costs on appeal.

COOPER, J.*

We concur:

NOTT, Acting P.J.

DOI TODD, J.

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Eight, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.